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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON MARTIN CALDERON,

Defendant and Appellant.

E070650

(Super.Ct.No. INF1100896)

OPINION

APPEAL from the Superior Court of Riverside County. Jessica Perrin Silvers, Judge. (Retired Judge of the Los Angeles Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gary Finn for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

In 2012, defendant and appellant Ramon Martin Calderon, a citizen of Mexico and a lawful permanent resident of the United States, pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378). In return, the remaining allegations were dismissed and defendant was placed on formal probation for a period of three years on various terms and conditions of probation. After defendant completed his probation, in 2015, defendant was placed into removal proceedings by the federal government.

Subsequently, in 2017, defendant filed a motion to vacate his conviction pursuant to Penal Code¹ section 1473.7, arguing his trial counsel was ineffective during the plea bargaining process, and that he did not meaningfully understand the immigration consequences of his plea. Following an evidentiary hearing, the trial court denied defendant's motion to vacate his guilty plea.

On appeal, defendant argues the trial court erred in denying his motion to vacate his guilty plea because his trial counsel was ineffective in failing to investigate the immigration consequences of his guilty plea and for failing to defend or mitigate the immigration consequences. We find no error and affirm the judgment.

¹ All future statutory references are to the Penal Code unless otherwise stated.

II

FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 2011, defendant was a passenger in a vehicle driven by his codefendant Stella Blasnumo when the vehicle was lawfully stopped by law enforcement. Upon a lawful search of the vehicle, police officers discovered 57 grams of methamphetamine and a firearm within the vehicle.

On April 18, 2011, a felony complaint was filed charging defendant and his codefendant with possession of methamphetamine for sale (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). Defendant was also charged with child endangerment in violation of Penal Code section 273a, subdivision (a).

On May 18, 2011, the People filed an amended complaint dismissing the child endangerment charge, and alleging that defendant was personally armed with a firearm (§ 12022, subd. (c)) during the commission of the offenses, and that defendant possessed for sale 28.5 grams or more of methamphetamine and 57 grams or more of a substance containing methamphetamine (§ 1203.073, subd. (b)(2)).

On April 12, 2012, pursuant to a negotiated plea agreement, defendant pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378). In return, the remaining counts and allegations were dismissed, and defendant was placed on probation for a period of three years on various terms and conditions of probation.

Prior to pleading guilty, defendant executed a felony plea form. In relevant part, in his plea form under “Consequences of Plea,” defendant initialed paragraph 4, which stated: “If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Defendant also initialed paragraph 11 under “Consequences of Plea,” which identified, “Other.” Next to “Other” was a written statement by his trial counsel, which asserted: “Counsel has informed Δ [defendant] that plea will have the consequence of deportation, exclusion from U.S. and denial of naturalization. (*Padilla; Strickland* advisement.)” On the second page of defendant’s felony plea form, his trial counsel handwrote the following note under section 3 entitled, “My guilty pleas are conditional on receiving the following considerations as to sentence:” “Consequence will be deportation, exclusion from U.S. and denial of naturalization.” The felony plea form was signed by the district attorney, defendant, defendant’s trial counsel, James Silva, and the interpreter.

At the change of plea hearing on April 12, 2012, the trial court went over the plea with defendant. The court asked defendant if he had discussed his case in length with his attorney and whether he wanted to plead guilty. Defendant responded in the affirmative to both questions. Defendant also indicated that he had no further questions of his attorney at that time. In addition, the trial court went over the felony plea form with defendant and noted that the form had defendant’s initials and signature. In response to the court’s query of whether all the statements on the plea form were true, defendant

respondent affirmatively. After the court found defendant had entered his plea of guilty knowingly, freely, intelligently, and voluntarily, the court sentenced defendant to formal probation for a period of three years on various terms and conditions of probation, including credit for time served of one day plus 364 days in the sheriff's labor program.

Defendant subsequently completed his probation, and on November 6, 2015, due to his aggravated felony conviction, defendant was placed into removal proceedings by the federal government.

On July 21, 2016, defendant filed a motion to withdraw his guilty plea pursuant to section 1016.5.

On July 28, 2016, the trial court denied defendant's section 1016.5 motion to withdraw his guilty plea. Defendant subsequently appealed.

On September 23, 2016, defendant filed an amended notice of appeal from the trial court's denial of his section 1016.5 motion to vacate his guilty plea.

On January 30, 2017, defendant filed a motion to vacate his conviction pursuant to section 1473.7 with supporting exhibits. Defendant declared that his counsel who represented him at the plea hearing recommended he plead guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378), and never discussed the possibility of pleading guilty to any other charge that was not an aggravated felony. Defendant claimed the record does not include any indication that he was advised, prior to entering his guilty plea, that the plea could carry immigration consequences. He also stated that since pleading guilty to the possession for sale charge, he had been placed into

removal proceedings brought by the United States Department of Homeland Security. He therefore argued that his counsel was ineffective by failing to completely advise him of the immigration consequences of his guilty plea and also by failing to defend against the immigration consequences of his guilty plea.

On April 17, 2017, the People filed an opposition to defendant's motion to vacate his plea pursuant to section 1473.7, noting the trial court was without jurisdiction to hear the motion as defendant had filed a notice of appeal.

On May 1, 2017, defendant filed a reply to the People's opposition, asserting that defendant and his counsel have "decided to abandon and withdraw the appeal in the Court of Appeals"

On May 3, 2017, defendant filed a declaration from his former trial counsel, Attorney Silva, who had represented defendant at the time of his guilty plea. In relevant part, Attorney Silva stated that he, the public defender's office, and the deputy district attorney were aware of the immigration status concerns of defendant and that he had advised defendant to "seek a second opinion concerning the plea consequences on his immigration status re: deportation, denial of entry into the U.S., and denial of naturalization." Attorney Silva also declared that he had informed defendant of the immigration consequences of the plea, that he had referred defendant to an immigration attorney, and that defendant had agreed to speak with the immigration attorney. Attorney Silva further stated that he had informed defendant that "his options were to reject the package deal offer[ed by the district attorney] and proceed to PH [preliminary hearing]

and trial or accept the offer with probation and the consequences of deportation, exclusion from admission into the U.S., and denial of naturalization.” In response to defendant’s question, Attorney Silva told defendant that he could not discuss the options with his codefendant because she had an attorney representing her. Defendant responded that he would discuss the matter with his codefendant, and when Attorney Silva asked defendant whether he had made a decision to accept the plea offer or proceed to the preliminary hearing, defendant asserted that he was concerned about his codefendant. Attorney Silva again reminded defendant that he could not speak to the codefendant and that defendant needed to make a decision. Defendant subsequently left, returned shortly, and informed Attorney Silva that he would accept the plea offer. After defendant confirmed his decision to accept the plea offer, Attorney Silva prepared the plea form documents and requested a Spanish language interpreter. In Attorney Silva’s presence, defendant then listened to the interpreter as the interpreter read the plea form documents. Defendant initialed and signed where indicated on the plea form and the probation memorandum. With the assistance of the interpreter, Attorney Silva asked defendant if he understood the plea form documents he signed and initialed. Defendant responded that he understood the plea form documents and that he had no questions. In conclusion, Attorney Silva declared that defendant understood the terms of his plea, and the terms of his probation.

On May 5, 2017, pursuant to defendant’s request, this court dismissed defendant’s appeal.

On July 25, 2017, defendant filed another motion to vacate his guilty plea pursuant to section 1473.7 with supporting exhibits. Defendant claimed that he received ineffective assistance of counsel when he was neither advised adequately nor understood the immigration consequences of his guilty plea. He also asserted that his counsel made no effort to mitigate the immigration consequences of his guilty plea.

On August 21, 2017, the People filed an opposition to defendant's section 1473.7 motion to vacate with supporting exhibits. The People argued defendant's motion was untimely and that he failed to establish he did not understand the immigration consequences of his guilty plea.

Following numerous continuances, defendant's section 1473.7 motion to vacate his conviction was heard on April 16, 2018. At that time, Attorney Silva and the deputy district attorney involved in the plea negotiations testified. In relevant part, Attorney Silva testified that at the time he represented defendant, he was aware of defendant's immigration concerns, and informed defendant that there were immigration consequences if he decided to plead guilty. Attorney Silva advised defendant that he would "definitely" be deported if he accepted the People's offer of pleading guilty to possession for sale of methamphetamine in violation of Health and Safety Code section 11378. Attorney Silva admitted that the other count defendant was charged with, transportation of a controlled substance in violation of Health and Safety Code section 11379, only carried the possibility of deportation and would have been a "safer" option to avoid deportation, but would have carried more custody time. However, despite a violation of Health and

Safety Code section 11379 carrying only the possibility of deportation, Attorney Silva informed defendant that a conviction of either offense would be “almost the same.” Attorney Silva acknowledged that he never discussed the phrase “aggravated felony” with defendant but that he simply told defendant that a violation of Health and Safety Code section 11378 was a deportable offense.

Attorney Silva explained that he appeared in court with defendant on “quite a few” occasions and that the People’s offer was for defendant to plead to a violation of Health and Safety Code section 11378. Attorney Silva countered the People’s offer, and asked the prosecutor if defendant could plead guilty to a violation of Health and Safety Code section 11377, simple possession of drugs instead, or a violation of Health and Safety Code section 11379, transportation of drugs. However, the prosecutor refused and said the only other alternative was to proceed to the preliminary hearing and trial.

Attorney Silva stated that he discussed these options with defendant, and that defendant allowed him to continue the preliminary hearing date to give defendant time to consult with an immigration attorney who was recommended by Attorney Silva. Attorney Silva did not know whether defendant ever spoke to the immigration attorney.

Attorney Silva also testified that at the next preliminary hearing date, he observed defendant speaking to his codefendant, and subsequently defendant decided to accept the People’s offer. Because Attorney Silva was aware of the immigration consequences of defendant’s plea, he decided to include a handwritten note on the plea form that indicated he had discussed with and advised defendant regarding the immigration consequences of

his plea, including deportation, exclusion from the United States, and denial of naturalization. Defendant acknowledged these consequences by initialing the form in all relevant areas. With the help of a Spanish language interpreter, Attorney Silva reviewed the plea form with defendant, who indicated he understood the contents of the plea form.

The deputy district attorney testified that Attorney Silva had informed her that defendant wished to speak to an immigration attorney concerning his immigration consequences. She recalled that Attorney Silva had requested a plea to a lesser offense than Health and Safety Code section 11378, but did not recall whether he had specifically requested a plea to Health and Safety Code section 11379. Nonetheless, the prosecutor testified that she would not have agreed to a plea to Health and Safety Code section 11379. The deputy district attorney recalled Attorney Silva making a counteroffer of simple possession in violation of Health and Safety Code section 11377, but the counteroffer was not accepted by the People.

Following testimony and argument from counsel, the trial court denied defendant's section 1473.7 motion. The court based its decision on the handwritten notes on defendant's plea form, which stated, "will be deported" in two different places, and the fact that Attorney Silva had discussions with defendant about the immigration consequences of his plea. The court noted, "it seems that Mr. Silva, over a period of a year, was constantly discussing the immigration aspects." The court also explained that whether Attorney Silva had informed defendant the charge he pleaded to was an "aggravated felony" was of no importance because that phrase would have had no

meaning to defendant. The court further noted that the People were clear that they wanted a plea to Health and Safety Code section 11378, thus it was highly unlikely defendant could have gotten a better result with a plea to Health and Safety Code section 11379. The court pointed out that Attorney Silva made it “very clear” to defendant that he had the right to proceed to a preliminary hearing. The court ultimately found that defendant “really did understand that he will be deported.”

On June 1, 2018, defendant filed a timely notice of appeal.

III

DISCUSSION

Defendant argues the trial court erred in denying his section 1473.7 motion to vacate his guilty plea because Attorney Silva was ineffective when he failed to investigate the immigration consequences of the guilty plea and failed to defend against or mitigate those consequences. We find defendant’s contention lacks merit.

Section 1473.7 provides in pertinent part: “A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence [if] . . . [t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.”² (§ 1473.7,

² We note that, effective January 1, 2019, section 1473.7, subdivision (b), was amended to read that a motion pursuant to section 1473.7, subdivision (a)(1), “shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.” (§ 1473.7, subd. (b)(1).) Thus, the Legislature’s intent to allow a
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subd. (a)(1).) The statute “allows a defendant, who is no longer in custody, to challenge his or her conviction based on a mistake of law regarding the immigration consequences of a guilty plea or ineffective assistance of counsel in properly advising the defendant of the consequences when the defendant learns of the error postcustody.” (*People v. Perez* (2018) 19 Cal.App.5th 818, 828 (*Perez*).) The burden is on the defendant to show, by a preponderance of the evidence, that he or she is entitled to relief. (*Id.* at p. 829.)

We agree with the People that abuse of discretion is the appropriate standard where the section 1473.7 motion to vacate is made based on statutory error or a deprivation of statutory rights. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [decision to deny a motion to withdraw a guilty plea rests in the sound discretion of the court].) However, where the section 1473.7 motion is made based on a claim of ineffective assistance of counsel, our review of the superior court’s order denying the motion is de novo. (See *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76, 79 (*Ogunmowo*); accord, *People v. Tapia* (2018) 26 Cal.App.5th 942, 950 (*Tapia*); *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116-1117 (*Olvera*).) Under this standard, we “accord deference to the trial court’s factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the

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person to file a motion to vacate a conviction, even if not in removal proceedings, is now clear.

facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant. [Citations.]" (*Ogunmowo*, at p. 76.)

A petitioner may obtain relief under section 1473.7 without demonstrating his attorney was constitutionally ineffective. (See § 1473.7, subd. (a)(1) ["A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel"].) But where the motion to vacate is based on an attorney's constitutionally deficient performance, section 1473.7 does not relieve defendant of his burden to show counsel was ineffective under the *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) test. (See *Ogunmowo*, *supra*, 23 Cal.App.5th at p. 75 [to show entitlement to relief under section 1473.7 based on ineffective assistance of counsel, defendant must satisfy *Strickland* test]; accord, *Olvera*, *supra*, 24 Cal.App.5th at pp. 1116-1117; *Tapia*, *supra*, 26 Cal.App.5th at p. 951.) "Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.]" (*Ogunmowo*, at p. 75.) Thus, to obtain relief under section 1473.7 based on a claim of ineffective assistance, defendant had to prove "that (1) counsel's representation fell below an objective standard of reasonableness, as judged by 'prevailing professional norms' [citation], and, (2) 'but for counsel's unprofessional errors, the result of the proceeding would have been different' [citations]; that is, 'a reasonable probability exists that, but for counsel's incompetence, he would not have

pled guilty and would have insisted, instead, on proceeding to trial’ [citations].” (*Olvera*, at pp. 1116-1117.)

Defendant argues that his trial counsel was ineffective for failing to investigate the immigration consequences of his guilty plea, “and by failing to defend against or mitigate those consequences.” The record does not support this contention. Rather, substantial evidence shows that defendant’s trial counsel informed him of the immigration consequences of the guilty plea, that defendant was aware of the immigration consequences of his guilty plea, and that he understood those consequences. Attorney Silva repeatedly informed defendant of the immigration consequences of his guilty plea in that he would be deported, excluded from the United States, and denied naturalization. Specifically, at the section 1473.7 hearing, Attorney Silva testified multiple times that prior to defendant’s guilty plea, he informed defendant “he would be deported” and that a violation of Health and Safety Code section 11378 was “deportable.” The trial court explicitly found that defendant was informed of the immigration consequences by his attorney and twice in the change of plea form. The plea form reflects that defendant was informed that the guilty plea “will” result in immigration consequences, and defendant repeatedly affirmed his understanding of those consequences. (See *Perez, supra*, 19 Cal.App.5th at pp. 829-830 [per section 1473.7, defendant failed to show lack of “meaningful[] understand[ing]” of immigration consequences because plea form, defense counsel, and trial court described those consequences and defendant stated that he understood them].) The plea form included two handwritten notes from Attorney

Silva explaining the consequence of mandatory deportation. At the change of plea hearing, defendant confirmed he had signed and initialed the plea form and that he understood his plea. (See *Tapia, supra*, 26 Cal.App.5th at pp. 951-953 [substantial evidence showed the defendant was advised of actual immigration consequences by the court’s advisement that his conviction “would” result in deportation]; *Olvera, supra*, 24 Cal.App.5th at p. 1115 [plea advisement form advised the defendant that his conviction “will, now or later, result in my deportation”].) Accordingly, the record affirmatively shows defendant meaningfully understood the immigration consequences of his plea. (See *Perez, supra*, 19 Cal.App.5th at p. 830.)

In *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*), the United States Supreme Court addressed what constitutes deficient performance under the *Strickland* test, with regard to advising a defendant on the deportation consequences of pleading guilty. The Supreme Court recognized a duty to advise regarding the potential immigration consequences of guilty or no contest pleas. (*Id.* at p. 374 [“[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.”].)

Here, defendant has not demonstrated that his counsel’s performance was deficient. Defendant was properly given the required immigration advisements explicitly by his attorney on the plea form and orally by his attorney, and defendant said he understood the consequences. In fact, defendant was even given time to consult an immigration attorney prior to pleading guilty. Moreover, defendant’s trial counsel attempted to negotiate a reduced charge of simple possession. However, that

counteroffer was rejected by the prosecutor. In short, defendant has not demonstrated trial counsel's performance fell below an objective standard of reasonableness.

Even assuming that counsel's performance was somehow deficient, defendant has failed to establish prejudice. Below, he averred that, if counsel had informed him he would be deported as a consequence of his guilty plea, he would not have pleaded guilty, but would have opted to proceed to trial. On appeal, he asserts that "he clearly would not have pled guilty had he known the true immigration []consequences of this conviction." Defendant's assertion that he would not have pleaded guilty was not corroborated by objective evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938; *In re Resendiz* (2001) 25 Cal.4th 230, 253, abrogated in part on other grounds as stated in *Padilla, supra*, 559 U.S. at p. 370.) A defendant's self-serving statement that, with competent advice, he would not have pleaded guilty "is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Alvernaz*, at p. 938; accord, *Resendiz*, at p. 253 [A defendant's assertion that he would not have pleaded guilty but for counsel's misadvice or failure to advise regarding the immigration consequences of the plea "'must be corroborated independently by objective evidence.'"].)

Moreover, in contrast to his claim, the record shows defendant was willing to enter a guilty plea with immigration consequences, as he signed a form acknowledging his guilty plea *will* have immigration consequences. Additionally, defendant did not adduce

any objective evidence demonstrating the prosecutor might ultimately have agreed to a plea that would have allowed him to avoid adverse immigration consequences. (See *Perez, supra*, 19 Cal.App.5th at p. 830.)

“‘Surmounting *Strickland*’s high bar is never an easy task,’ [citation], and the strong societal interest in finality has ‘special force with respect to convictions based on guilty pleas.’ [Citation.] Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” (*Lee v. United States* (2017) __ U.S. __, [198 L.Ed.2d 476, 487] (*Lee*).) In determining whether prejudice has been established in this context, courts must consider the likelihood of success at trial, the potential consequences after a trial compared to the consequences flowing from the guilty plea, and the importance of immigration consequences to the defendant. (See *id.* at p. __ [*id.* at pp. 486-487].)

Here, defendant offered no contemporaneous evidence to support his assertion that he would not have pleaded guilty had he known the “true immigration consequences” of his guilty plea. In *Lee*, the defendant had repeatedly asked his attorney if he could be deported and counsel testified that the defendant would have proceeded to trial had he known he would face deportation. (*Lee, supra*, __ U.S. at p. __ [198 L.Ed.2d at pp. 485-488].) No such evidence was offered here.

On the record before us, we conclude that defendant has not carried his burden of establishing that his counsel's performance was deficient. He was properly given the required immigration advisements at the time of his plea. Defendant has also failed to demonstrate he was prejudiced. He has not shown he would have not pleaded guilty and instead insisted on proceeding to trial. He has failed to show how he would have succeeded at trial. He has also failed to demonstrate that his counsel could have negotiated an alternative plea that would have avoided adverse immigration consequences. Ultimately, defendant has not shown by a preponderance of the evidence that he was entitled to relief under section 1473.7. (§ 1473.7, subd. (e).) As such, the trial court did not err in denying defendant's section 1473.7 motion to vacate his guilty plea.

IV

DISPOSITION

The order denying defendant's motion to vacate his conviction pursuant to section 1473.7 is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.